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BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

INTERMODAL BRIDGE
TRANSPORT,
Employer

and
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,
Charging Party

**Case Nos. 21-CA-157647
21-CA-177303**

**CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

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I. Statement of the Case

On November 28, 2017, Administrative Law Judge Dickie Montemayor (“Judge Montemayor” or the “ALJ”) correctly found that Intermodal Bridge Transport (“IBT” or “Respondent”) violated the National Labor Relations Act (the “Act”) by: misclassifying its lease drivers as independent contractors (an independent violation of Section 8(a)(1) of the Act); coercively interrogating and polling employees regarding their support for the International Brotherhood of Teamsters (the “Union”); threatening drivers with unspecified reprisals and suggesting that they leave the Company rather than engage in protected concerted activity; expressing to employees that a union organizing campaign would be futile; and threatening employees with plant closure for supporting the Union. Judge Montemayor erred, however, by failing to find that Respondent violated the Act as otherwise alleged in the consolidated complaint.

Specifically, Judge Montemayor incorrectly found that Respondent did not violate Sections 8(a)(1),(3), or (4) of the Act by suspending and/or discharging Eddie Osoy (“Osoy”), and that Vicky Rosas’ (“Rosas”) statements to Osoy on behalf of IBT did not violate the Act as alleged in the consolidated complaint. In reaching these flawed conclusions, the ALJ overlooked relevant facts in the record and relied on flawed factual and legal conclusions. The record in this case, and well-settled case law, make clear that IBT suspended

and/or discharged Osoy for his Union and protected concerted activity—including filing labor charges against IBT at the NLRB—and that IBT did not have a non-pretextual reason for this adverse action.¹ Further, the record makes clear that Rosas' statements to Osoy, made on behalf of IBT, created an unlawful impression of surveillance and constituted a threat of discharge for engaging in Union and/or protected concerted activity.

As such, for the reasons more fully described below, the Board should reverse the portions of the ALJ's decision finding that Osoy's discharge and/or suspension and Rosas' statements did not violate the Act as alleged in the consolidated complaint.

II. Statement of Facts

A. Background

Osoy has been a driver for IBT since approximately 2008. (Tr. 113).² Osoy began working for IBT as an employee through the Staffmark agency,

¹ IBT's choice to have two armed guards humiliatingly remove Osoy from the property in front of other employee drivers, when IBT could have easily taken less extreme action, not only supports a finding of discriminatory intent, but also constituted an independent violation of Section 8(a)(1) because it restrained and coerced employees' exercise of Section 7 rights.

² Citations to "ALJD 'page:lines'" refers to specific page and lines in Judge Montemayor's decision in the case at hand. Citations to "Tr. 'page'" refers to the pages from the transcript of the hearing in front of Judge Montemayor in the instant case. References to specific exhibits will be referred to as "GC Exh. ____" for General Counsel exhibits, "R. Exh. ____" for Respondent exhibits, and "U. Exh. ____" for Union exhibits.

then began leasing a truck directly from IBT when IBT told him he had to do so in order to continue working. (Tr. 113-15). Osoy has not driven for any other company during this time.³(Tr. 285-86). He is not incorporated, is not registered as a trucking business, does not have his own motor carrier operating authority, and has never used the truck he leases from IBT to deliver loads for any company other than IBT. (Tr. 196-97, 181). As late as 2014, IBT considered Osoy one of IBT’s “most respected, well liked, and responsible” drivers. (U. Exh. 7, 8).

Osoy has been an open and conspicuous supporter of the Union since the organizing drive first began at IBT in 2015, and “it is undisputed that the Employer was aware of Osoy’s Union activity.” (ALJD 28:31-36; Tr. 1909, 2350). Osoy regularly wears union vests at the IBT yard, and regularly appears on flyers and in the press expressing his support for the Union—including in a May 2016 article from the Los Angeles Business Journal. (ALJD 28:26-28, 34-36; GC Exh. 5; Tr. 188, 219-20). Osoy is also a plaintiff in a lawsuit against IBT for misclassification and “theft of salary.” (Tr. 197).

³ Except for a two-day period when Osoy left IBT because IBT would not place him on the day shift. (Tr. 285-86).

B. Safety Coordinator/Assistant Rosas Creates an Impression of Surveillance and Threatens Osoy

Sometime before May 2016, IBT suspended Osoy twice for not signing his contract with IBT and for not turning in his logbook during a week when the Union was on strike. (Tr. 208). On one of these occasions, Safety Coordinator/Assistant Rosas informed Osoy he was being suspended after a dispatcher directed Osoy to contact Rosas to find out why he was out of service. (Tr. 210-11). Rosas works as the Safety coordinator (or safety assistant) in IBT's safety department and reports directly to Safety Director Brent Bradley. (Tr. 3448).⁴ In May 2016, Osoy went to speak with Rosas regarding these suspensions—Osoy had known Rosas for a long time and had a good relationship with her. (Tr. 208-09).

Osoy told Safety Coordinator/Assistant Rosas that IBT was being unjust towards him and was suspending him unjustly. (Tr. 210). Rosas said she knew because Osoy always complained about a dispatcher, but that she could not do anything because her hands were tied. (Tr. 210). Rosas then told Osoy to be careful because IBT was recording and listening to them. (Tr. 211). Osoy responded that Rosas should also be careful about what she said—he said this because he had previously heard Rosas say that she was going to be

⁴ Judge Montemayor correctly found that Safety Coordinator/Assistant Rosas was, at all material times, including during this conversation, a supervisor and agent of Respondent. (ALJD 2:27-33)

in charge of firing the drivers that supported the Union. (Tr. 211). During this conversation, Rosas also told Osoy that she was aware that some drivers were going to make charges at the Labor Board in Los Angeles. (Tr. 211-212).

Safety Coordinator/Assistant Rosas admits that Osoy confides in her and told her about labor charges, and that she was aware of charges being filed at the NLRB. (Tr.3459, 3502-03). She also admits that Osoy contacted her after being put out of service for his logs. (Tr. 3423-24; 3457-59; 3460-61; 3502-03). Although initially denying that drivers spoke to her about the Union, Rosas later admitted that multiple drivers did talk to her about the strike. (Tr. 3461-62) Finally, Rosas explained that IBT does keep rotating cameras in the yard and that both she and Safety Director Bradley have access to those cameras. (Tr. 3463).

C. Osoy and Molina Argue in May 2016

Osoy was aware that one of the owner-operators he worked with, Jose Molina (“Molina”), did not support the Union because Molina would pass out anti-union paraphernalia to other drivers. (Tr. 221). Other drivers reported to Osoy that Molina called him the small soldier and that Molina said he was going to send Osoy “to shit” and that Osoy “would not last at the company.” (Tr. 221-22). Molina also made it clear to other drivers that if it was up to him, the Union would not enter IBT. (Tr. 222).

On May 25, 2016, Osoy was having a conversation with another driver when Molina began handing out vests on behalf of IBT. Osoy told the driver he was talking to that he should go get a vest before they ran out. (Tr. 220-23). This prompted Molina to approach Osoy. Molina became aggressive and was screaming at Osoy about vests. He called Osoy a gossip and began saying that he was going to make sure that Osoy was taken out of the company. (Tr. 223-24). Molina also brought up the Union, saying that the Union was no good and that he was going to make sure the Union never got to IBT. (Tr. 224). Osoy responded that Molina did not understand the other drivers' cause because he owned his truck. (Tr. 224).

Molina's screaming drew other people to the conversation. Molina's supporters tried to calm him down and pull him away. (Tr. 224-25). Osoy noticed that Molina was looking at a camera in the yard, so Osoy said "What's your problem. If you have a problem, let's go outside and we can discuss it." (Tr. 224-25). Pedro Miranda ("Miranda"), a driver who witnessed the majority of the incident, describes Osoy as "calm" while he made that statement. (Tr. 975). Osoy himself denies that this comment was intended as an invitation to fight Molina as Molina was significantly bigger than he was—Osoy only said it because he did not want to argue in IBT's private yard (presumably because of the cameras that he noticed and that Safety Coordinator/Assistant Rosas had warned him about). (Tr. 225).

Molina confirms that he was handing out vests to drivers on this day and that he was the one that approached Osoy. He admits asking Osoy if Osoy had a problem with him handing out vests. Molina also admits that he was the one that brought up the Union in his discussion with Osoy—Molina believes that Osoy is always reporting to the Teamsters. (Tr. 2813-14). Molina's other claims about what Osoy said, however, were not corroborated by any other driver. (Tr. 225, 717-20, 852-53, 974-75, 2814-16). Molina claimed that Osoy suggested they beat the crap out of each other, that Osoy had security open the gate, that Osoy went outside to call Molina, and that Osoy called the bigger group of gathered drivers sons of whores and said anyone that had a problem with him could go outside to beat the crap out of each other. (Tr. 2814-16, 2818-19, 2834).

These claims by Molina are not supported by the evidence in the record. Portillo, who was present shortly after the incident began, corroborates Osoy's version of events—Osoy said they should go outside to talk and fix their issues, but never said anything about fighting. (Tr. 720; 852). Miranda also remembers Osoy saying to Molina that they should go outside to talk and fix their problems, but did not mention anything about fighting. (Tr. 974-75). Neither of these witnesses corroborate Molina's version of events.

Molina himself, despite his claims about Osoy making physical threats, admits that he did not take Osoy's words seriously and only reported the

incident to IBT because he thought the Union supporters would be reporting their version to the Teamsters. (Tr. 2820-21). Molina initially reported the incident to Christina Rivera (“Rivera”), IBT’s customer service manager.

Although Molina gave her the names of various drivers who witnessed the incident, Rivera did not take notes or solicit a written statement from Molina.

Although Safety Director Bradley did enter the room for a moment when Molina was making his report to Rivera, Bradley also did not take notes or solicit a written statement from Molina. Vice President Zea never discussed the incident with Molina. No IBT manager followed up with Molina after his initial report. (Tr. 2827-29).

D. Osoy Finishes Working but is Suspended and/or Discharged the Following Day

Once the argument diffused, without any physical escalation at all, Osoy was given an assignment by a dispatcher. Osoy worked for several hours and then returned his keys to IBT, without anyone bringing up the incident. Osoy was then assigned a very favorable early morning assignment for the next day—an assignment that was not offered to him often. (Tr. 227-28). That next day, Osoy showed up to work earlier than usual, at around 4:15 a.m., because of the early morning assignment he had been given. Osoy was not able to complete that assignment, however, because the container

was locked. It was unusual for an assigned container to be locked in this way. (Tr. 228-29).

Osoy then had to wait around the yard for IBT managers to arrive so that he could check on why the container was locked. Although both Manager Rivera and Safety Director Bradley typically arrived to work at 7:00 a.m. or later, on this day they showed up to the IBT yard at around 5:00 a.m.—close to morning dispatch starting when the most drivers would be waiting for dispatch. Osoy approached Rivera and asked her to unlock the container he had been assigned the night before. Rivera just told Osoy to wait in the yard, with other drivers, unsupervised. (Tr. 228-29; 269). Eventually Bradley emerged from the office and told Osoy that they needed to meet. (Tr. 229-30).

Osoy followed Safety Director Bradley to his office and immediately encountered two security guards standing in the office—these guards were not normally present at IBT, but Osoy had seen them at the IBT yard when drivers had previously gone on strike. (Tr. 228-30; 269). Both of those security guards were armed and carrying handcuffs . (Tr. 4075-76; 4082-83). Bradley handed Osoy a letter claiming that Osoy had threatened bodily harm to Molina and other drivers. The letter advised Osoy that he was “prohibited from entering IBT’s property until further notice.”⁵ (Tr. 229, 1916; Jt. Exh.

⁵ Safety Director Bradley also advised Respondent’s managers and dispatchers via email that Osoy was prohibited from entering Respondent’s

1(e)). This letter was in English and was not translated for Osoy. (Tr. 232).

Although Osoy attempted to explain to Bradley what had occurred with Molina, Bradley confirms that he would not let Osoy respond because he just “wanted him off the property.” (Tr. 231, 1916). Bradley did not, however, make any effort to contact Osoy the previous night or earlier that morning before Osoy showed up on IBT’s property. (Tr. 1915-16).

This meeting lasted approximately one minute. Although Safety Director Bradley had not gotten Osoy’s statement and had not spoken to any other driver about the incident, Bradley asked the armed “officers” to escort Osoy off the property. (Tr. 1916-18). The guards did so, following closely, and first taking Osoy to the company truck where he had left some personal belongings. (Tr. 232-33; 4070-71; 4079). Two other drivers joined Osoy at the truck—one helped Osoy with his belongings because Osoy was nervous and upset, and the other translated Bradley’s letter for Osoy. (Tr. 233; 526-27; 599; 4071; 4080). The guards refused to let Osoy make a phone call, going as far as taking out their handcuffs when Osoy tried, until Osoy’s coworker told Osoy to listen to the guards so that he would not be arrested. (Tr. 233, 525-7, 599, 4087-88). The guards then escorted Osoy to his personal vehicle. (Tr. 233; 4087).

property until further notice, without any mention of a pending investigation. (GC Exh. 102).

This whole incident transpired while approximately 40 other IBT drivers were in the yard waiting for dispatch to begin.⁶ Some anti-union drivers even laughed at Osoy and turned their backs to him when Osoy told them that what was happening was unjust. (Tr. 233; 527). This whole incident made Osoy very nervous, and Ortiz noticed that Osoy was on the verge of tears. (Tr. 527). Osoy then exited the property in his personal vehicle, stopping outside the IBT yard and beginning to cry. Osoy had never seen anyone else get escorted out of the IBT yard in that manner, and it “torments [him] to this day that they took [him] out as if [he] was a delinquent for something that didn’t have reason.” (Tr. 233-34).

E. Osoy is Returned to Work After Osoy Involves the Union and Forces IBT to Review his Version of Events

Shortly after exiting the property, Osoy contacts the Union and some of his coworkers. They tell Osoy that they will assist him and they take him to write down his version of what occurred. (Tr. 234). With the assistance of the Union, Osoy sent an email to Vice President Zea and Safety Director Bradley the following day. (ALJD 27:25-27; Tr. 235, 239-40; GC. Exh. 6). In this email, Osoy protested the unprofessional, unjust, and retaliatory way he removed from IBT’s property. He made clear that he never threatened

⁶ The day-shift dispatch begins at around 6:00 a.m., and most day-shift drivers show before that to wait for dispatch—some as early as 4:00 a.m. (Tr. 2138-40; 2885-87; 2931; 3131; 3287-88; 3331-32; 3373).

anyone and that it was Molina who had instigated the incident by being aggressive with Osoy. Osoy explained that Molina had been harassing Osoy for weeks, and that he was part of a group of drivers who were always “insulting, intimidating, and threatening union supporters.” (GC Exh. 6).

Osoy further points out IBT’s lack of investigation before taking action, and the fact that IBT could have contacted him the day before rather than luring him to the yard in order to have armed guards escort him out. Finally, Osoy points out that the actions taken against him were clearly because of his Union activity, as demonstrated by the fact that IBT failed to take any action against Molina who instigated this incident or against other anti-union drivers who regularly threaten union supporters without consequence. (GC Exh. 6).

Osoy also included a detailed incident report with this email. This contemporaneous incident report corroborates Osoy’s testimony at the hearing and lists the names of multiple witnesses to parts of the incident (witnesses who were never contacted by IBT regarding this incident). According to the incident report, Molina was the one who began the altercation when he became aggressive and yelled at Osoy. Molina had actually been verbally abusing Osoy for weeks and Molina outright said to Osoy that he wanted Osoy to be fired from the company. (GC Exh. 6). The incident report then explains how Osoy offered to go outside to discuss issues,

but that this was not to threaten other or to get into a fight—it was only because Osoy wanted to let the anti-union drivers know that he “was not scared of their intimidation or threats and that [he] would not let them keep [him] quiet or let them stop [him] from fighting for his rights at IBT.” (GC Exh. 6). In fact, it was Molina and not Osoy who had to be calmed down and taken away by his coworkers. (GC Exh. 6).

The following Tuesday, after the long weekend, Osoy received an email from Safety Director Bradley asking him to go into the office. Osoy showed up, and the security guards were there once again—even though Safety Coordinator/Assistant Rosas had told Osoy that they would not be. Bradley gave Osoy another letter, and Osoy asked Rosas to translate it. After having the letter translated, Osoy, through Rosas, told Bradley that what had happened was unfair. Bradley did not respond.

When Osoy asked Safety Director Bradley why Molina had not been disciplined, Bradley merely stated that he had not finished the investigation on Molina—unlike Osoy, however, Molina was not removed from work pending this alleged investigation. (Tr. 234-37; Jt. Exh. 1(g); GC. Exh 6; R. Exh. 6). Osoy attempted to continue this conversation with Bradley, but Bradley merely asked him if he was going to return to work or not. Osoy confirmed that he would be returning to work, reiterating that he had never been violent and affirming that he would continue to fight for his rights. (Tr.

237-38). While Osoy did return to work, he did not do so immediately because the Union began a five-day strike on that day over Osoy's suspension and/or termination. (Tr. 238).

F. IBT's Investigation, or Lack Thereof, Before and After Suspending Osoy

Aside from Molina's initial report to Manager Rivera, when Safety Director Bradley was momentarily present, the record does not evidence anything more than an incomplete and cursory investigation being conducted by IBT. Rivera, after speaking with Molina, called Vice President Zea, who was out of the country at the time. It was unusual for Rivera to call Zea when he was out of the country. (Tr. 2353). Without speaking to anyone else regarding the incident, Zea decided it was best to have Osoy physically removed from IBT's yard—even though this would not be possible until 24 hours later. (ALJD 27:17-18; Tr. 2353-56, 2358, 2829). On the day of the incident, based only on conversations with Rivera and Zea, Bradley went to take Osoy out of service but learned that Osoy had gone home. No evidence was presented that Bradley, Zea, or Rivera attempted to contact Osoy that night or the following morning to tell him not to report to work. (Tr. 1915-16).

After Safety Director Bradley had Osoy removed the following morning by two armed security guards, a group of drivers—including Portillo, Ortiz and Miranda—went to speak with Bradley. (ALJD 27:21-23; Tr. 527-28, 599-

600, 724-25, 976, 1926, 1937). They protested Osoy being removed while Molina, who had instigated the incident, was allowed to continue working. They stated that if either one was suspended, they should both be suspended pending the investigation. Bradley affirmed that he would be doing so, and that he would conduct an investigation, without offering specifics.⁷ (Tr. 527-531, 726-28, 854, 976-978, 1043, 1938). Molina was not, however, ever suspended or otherwise disciplined for this event. (Tr. 1939). In fact, Bradley admits that he did not even investigate the allegations made by Osoy against Molina in Osoy's email and incident report. (Tr. 1956-57). This appears at odds with a memo IBT distributed that same day to all drivers which, aside from inexplicably conflating threats in the yard with drivers' claims of being misclassified, claimed that IBT would not tolerate any driver threatening another driver. (Jt. Exh 1(f)).

Safety Director Bradley claims that he reviewed videos from IBT's cameras, and that the cameras did not capture the incident between Osoy and Molina (Tr. 1913).⁸ All Bradley appears to have done is spoken with Manager Rivera and Vice President, and spent a short while in the room

⁷ Although Safety Director Bradley claimed he took notes during this meeting, no notes were produced by Respondent in response to subpoenas from the Union and General Counsel. (Tr. 1926-27).

⁸ No recordings were produced by Respondent in response to subpoenas from either the Union or General Counsel.

while Molina made his initial report to Rivera on the day of the incident.⁹ IBT never interviewed Portillo, nor Miranda, nor Ortiz—nor any other driver witness—about the incident between Osoy and Molina. (Tr. 731-35; 976-978). Had it done so, IBT would have been told that Osoy was calm and did not make any threats. (Tr. 714-21; 851-53; 972-75). Even Molina admits he did not take anything Osoy said seriously. When Molina did report the incident to IBT—not because he felt threatened but just he thought Osoy would report his version to the Union—IBT did not take any written notes or ever ask

⁹ Although Safety Director Bradley vaguely testified that he interviewed Molina the day after the incident, on Friday May 27, (Tr. 1912, 1924-25), this unsubstantiated claim is not supported by the evidence in the record. Neither Bradley nor IBT produced any notes from such an interview, and in his testimony Bradley did not provide any additional details about this interview or what Molina allegedly said during this interview. (Tr. 1912, 1924-25).

IBT does not ask Molina about any conversation with Bradley in their direct examination of Molina. On cross examination, in response to questions from Counsel to the General Counsel, Molina essentially denies that this meeting occurred: “I explained a little bit to him and we don’t talk too much . . . I remember Mr. Brent came to the [] office when I report it to Christina . . . he stay right there only for a little bit.” Molina does not testify about any further conversation with Bradley. (Tr. 2829). Appearing to accept this response from Molina, Counsel for IBT fail to clarify this response on re-direct examination or to ask Molina about his conversations with Bradley at all. (Tr. 2831-32). Similarly, when IBT calls Bradley as a witness a few days later, Counsel for IBT does not ask any questions about his conversation with Molina or otherwise address Molina’s version of events. (Tr. 3778-3877). Again, IBT’s failure to introduce additional evidence regarding this alleged conversation should be treated as proof that IBT failed to challenge Molina’s testimony and is thus admitting that Bradley only spoke to Molina regarding this incident in the initial meeting with Rivera.

Molina for a written statement. In fact, no one from IBT approached Molina to even discuss this incident after his initial, verbal report. (Tr. 2820-21; 2826-2829).

IBT admits it did not even bother to get Osoy's version of events before removing Osoy from the premises—in fact, Safety Director Bradley actively avoided doing so when he was having Osoy removed. (Tr. 1916). The first time either Bradley or Vice President Zea learned of Osoy's version of events was in the email and incident report that Osoy, of his own volition and with the help of the Union, sent to IBT. IBT never even requested such a statement. (Tr. 1922-1924). Zea, who also decided to remove Osoy before speaking to any drivers about the incident, had never had any other drivers escorted out in the same manner as Osoy. (Tr. 2351-57). Zea also admits that Osoy is on the smaller side, and that Osoy had never engaged in this type of conduct before. (Tr. 2360-61). Bradley admits that no other driver had ever been removed from the IBT property based on a threat until IBT removed Osoy. (Tr. 1929).

G. IBT Confirms that it Intended to Terminate Osoy

Sometime after being removed from IBT's property, Osoy decided that he needed to pick up his paycheck. He went to the IBT yard but Rivera met him at the gate and told him he could not go inside. She said she would bring his paycheck to the gate. When Osoy inquired about what would happen to

his escrow check—which IBT keeps in reserve until drivers leave IBT—Rivera said that she did not know. (Tr. 270). Osoy went back home and a few hours later he received a call from Safety Coordinator/Assistant Rosas. Rosas informed Osoy that she had his escrow check ready, plus a check for two days of work. She then told Osoy that in order for him to get those checks, he would actually have to affirm his separation from IBT by signing a paper saying that he was leaving IBT. (Tr. 271). Osoy informed Rosas that he would not sign such a document and would therefore not take the checks. Osoy did not sign such a document or receive his final checks before returning to work. (Tr. 271).

H. IBT Treats Other Drivers More Leniently than Osoy

The record in this case demonstrates that IBT’s reaction to the allegations against Osoy was excessive and motivated by something other than Osoy’s conduct because other drivers who engaged in violent or threatening conduct at IBT were not removed with the speed, or in the manner, that Osoy was removed.

Prior to Osoy being terminated and/or suspended, and escorted out by two armed guards in full view of his coworkers, there is evidence of a driver who became “very aggressive and combative,” and even physically attempted to “get” a dispatcher. In his anger, this driver also damaged IBT property. This was done in front of the dispatcher, and the dispatcher reported it

directly to Vice President Zea. (Tr. 3960, 3993, U. Exh. 27). Despite this threatening conduct, it appears that IBT allowed this driver to continue working. (Tr. 3965-66; R. Exh. 88). IBT did not call in security guards or otherwise contact security when this incident occurred, and the driver was not even asked to leave the premises, much less was he escorted out by two armed guards in front of his coworkers the next time he showed up to the yard. (Tr. 1993-94).

Contemporaneously to Osoy, IBT's actions towards Molina also demonstrate disparate treatment. The record in this case indicates that Molina was the one that instigated the incident with Osoy. Osoy's incident report also explicitly accuses Molina of harassing and threatening Osoy on more than one occasion. Despite this, Safety Director Bradley admits that he did not even investigate these allegations against Molina. (Tr. 1956-58; 2357-2359). IBT never took any action against Molina—they did not have him escorted out by armed guards and they did not even suspend him or keep him out of service while allegedly investigating the incident. (Tr. 1937-1940)

The final examples of this disparate treatment occurred after Osoy had been suspended and/or terminated and escorted off the IBT property by armed guards. In June 2016, a security guard emailed Safety Director Bradley to inform Bradley that during a strike one of IBT's drivers got into a physical altercation with a picketer. The driver ignored the guard's orders

and physically pushed the picketer. (Tr. 1928-30; GC Exh. 89). Instead of calling armed guards to remove this driver the next time he came to work—like IBT did with Osoy—Bradley went out of his way to call this driver *before* he next showed up to work to tell him not to come in. Then, unlike when he refused to listen to Osoy’s account of his incident with Molina, Bradley requested that this driver write down his version of the event. Although IBT did eventually terminate this driver’s contract with IBT, it inexplicably took them 20 days to do so—even though the evidence was clear that this driver, unlike Osoy, actually physically attacked someone else. (Tr. 1930-34).

III. Argument

A. Safety Coordinator/Assistant Rosas’ Statements to Osoy, as a Supervisor and/or Agent for IBT, Created an Impression of Surveillance and Threatened Discharge (Exceptions 1-10, 22-29)

It is well settled Board law that threats of discharge in retaliation for protected concerted activity are “highly coercive” and are considered “hallmark” violations of the Act. *National Steel Supply Inc.*, 344 NLRB 973, 976-77 (2005). It is also well settled, as recognized by ALJ Montemayor, that the test for determining whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, the employee reasonably could conclude from the statement in question that his or her protected activities are being monitored. *Mountaineer Steel, Inc.*, 326 NLRB

787 (1998), *enfd.* 8 Fed.Appx. 180 (4th Cir. 2001), *see also*, *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005). Thus “an employer creates an impression of surveillance when it monitors employees' concerted protected activity in a manner that is ‘out of the ordinary,’ even if the activity is conducted openly.” *Rogers Elec., Inc.*, 346 NLRB 508, 509 (2006). This is because “Employees should not have to fear that ‘members of management are peering over their shoulders’” to monitor their Union or protected concerted activity. *Conley Trucking*, 349 NLRB 308, 314 (2007).

ALJ Montemayor correctly found that Safety Coordinator/Assistant Rosas spoke on behalf of Respondent because she was, at all material times, a supervisor and agent of Respondent. (ALJD 2:27-33; Tr. 3448). The ALJ erred, however, by finding that Rosas’ comments to Osoy, when Osoy approached her to discuss his unjust suspensions, did not constitute a threat or create an impression of surveillance. The ALJ’s error is rooted in his mistaken finding, which goes against the preponderance of all relevant evidence, that Rosas was credible in her testimony and in his failure to consider the totality of the circumstances surrounding Rosas’ conversation with Osoy.

1. The ALJ Should Have Credited Osoy's Testimony
Regarding His Conversation with Safety
Coordinator/Assistant Rosas

(Exceptions 1-6, 10, 22)

The ALJ's conclusion that Safety Coordinator/Assistant Rosas' actions did not violate the Act stems from his belief that Rosas was credible, appeared honest and trustworthy, and that she did not appear like the type of person who would engage in the conduct attributed to her. (ALJD 26). This conclusion is contrary to the record evidence and the ALJ's own finding that "There are numerous examples in the record of IBT engaging in what can be accurately described as a pattern of attempting to manufacture a record that would color the facts in its favor." (ALJD 10:10-12). From changing the names of forms and destroying old forms to instituting new forms that misrepresent the application process drivers go through, Respondent has shown no compunction to essentially lying as a way to avoid responsibility for its violations of the Act. Where, as here, "the clear preponderance of all the relevant evidence" is contrary to a Judge's credibility determinations, the Board is "impelled to substitute [its] own credibility findings for those of the Administrative Law Judge." *W. T. Grant Co.*, 214 NLRB 698 (1974) order dismissing complaint set aside by *Swinick v. N.L.R.B.*, 528 F.2d 796 (3d Cir. 1975); *Gold Standard Enterprises*, 234 NLRB 618 (1978) enfd. denied *NLRB v. Gold Standard Enterprises*, 607 F.2d 1208 (7th Cir. 1979).

When considering Respondent's extremely suspect actions in this case, the ALJ should have immediately been skeptical of all manager and supervisors testifying on behalf of IBT—after all, in an office this small, it is unlikely that a manager or supervisor was completely unaware of the actions that IBT was taking to color the record. In fact, some of the wrongdoing recognized by the ALJ directly involved Rosas and her duties: “One such example includes the creation of a form in which Brent Safety Director Bradley attests that the LTA was translated in Spanish when in fact Rosas testified that she never translated any LTA's in Spanish.” (ALJD 10:25-27). Further, Rosas' other testimony shows an attempt to couch her answers in a way that attempts to obscure the truth. For example, when initially asked whether drivers discussed the Union with her, Rosas said no. (Tr. 3461-62). When pressed, however, Rosas admitted that various drivers did speak with her about the strikes. (Tr. 3461-62). It stretches the imagination to think that Rosas did not consider a discussion about drivers going on strike a discussion about the Union. The ALJ erred by not finding that these facts diminished Rosas' overall credibility.

The General Counsel's witnesses, on the other hand, were all “earnest [and] genuine, and . . . they appeared serious and respectful of the hearing process.” *Os Transp. LLC*, 358 NLRB 1048, 1058 (2012). With some allowances for the fallacy of memory, the General Counsel's witnesses were

consistent in their testimony, a further indication of credibility. *G. C. Lingerie Corp.*, 146 NLRB 690, 698 (1964); *Hh3 Trucking, Inc.*, 33-CA-14374, 2004 WL 104108 (Jan. 20, 2004). Furthermore, the testimony of the General Counsel's witnesses should have been given more weight than the testimony of Respondent's managers and supervisors because "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Indus.*, 316 NLRB 745 (1995). That is exactly what Osoy did.

Although no driver could corroborate Osoy's conversation with Safety Coordinator/Assistant Rosas because it was a one-on-one conversation, Osoy's entire testimony, and his testimony about his conversation with Rosas in particular, was earnest, truthful, and without exaggeration. It is also logically inconsistent that Osoy would provide days of truthful testimony regarding his working conditions and his interactions with Vice President Zea and Quevedo, only to harm his credibility by making up a minor story about his interaction with Rosas. In fact, Osoy admits that he had a good working relationship with Rosas, which makes it even less likely that Osoy would make up this conversation.

When Osoy's lack of motive for lying and earnest, consistent testimony is weighed against the proven dishonesty of IBT's managers and supervisors

and the inherent benefit that would accrue to IBT from Safety Coordinator/Assistant Rosas denying the unlawful comments she made, the ALJ should have credited Osoy's testimony over Rosas' and should have found that the conversation between Osoy and Rosas did occur as testified to by Osoy.

2. Rosas' Comment to Osoy to "Be Careful" Because he Was Being Recorded Created an Unlawful Impression of Surveillance and Constituted a Threat of Discharge

(Exceptions 7-10, 23-28)

The ALJ erred in finding that, even if Safety Coordinator/Assistant Rosas did say to "be careful," this would not have violated the Act. The ALJ came to this incorrect conclusion because he failed to consider the totality of the circumstances surrounding the "be careful" comment. As a preliminary matter, it is worth noting that by the time this conversation occurred the organizing campaign was a prevalent topic in the workplace—drivers had been organizing for over a year and had been on strike three separate times. (Tr. 66, 73). Further, Osoy was one of the most visible leaders of the organizing campaign. (Tr. 77-80). Finally, the meeting with Rosas itself stemmed from an issue related to the organizing campaign—one of the unjust suspensions that Osoy wanted to discuss with Rosas occurred when Osoy failed to fill out his logbook *on a week when he and some of his coworkers were on strike with the Union*. (Tr. 208).

Therefore, at least in Osoy's mind, this meeting would have been tied to his Union activity. Now, had Rosas truly couched her responses in a degree of neutrality in an effort to navigate the difficult ground between drivers who support the Union and drivers who do not support the Union, Rosas could have avoided discussing the Union or labor charges entirely by focusing on discussing Osoy's specific complaints about his suspensions. Or Rosas could have immediately assured Osoy that no actions taken against him were because of his Union activity. Rosas did neither of those things.

Instead, during this conversation, Safety Coordinator/Assistant Rosas brought up drivers filing labor charges and implied that she—and by extension other IBT managers—are aware that these charges were being filed and of who is filing them. (Tr. 211-12, 3459, 3502-03). There is absolutely no non-coercive reason for Rosas to raise these charges in her conversation with Osoy. Further, Rosas did not merely mention the charges during this conversation—she told Osoy to be careful and pointed out to Osoy that IBT was recording and listening to him. (Tr. 211). Again, there is no non-coercive reason for Rosas to make these comments. IBT's cameras and IBT's ability to monitor what drivers say has nothing to do with the suspensions Osoy wanted to discuss with Rosas. Instead, these statements must be seen as what they actually are—an announcement by Rosas that IBT is monitoring employees' protected-concerted activities, such as the filing of

labor charges. Any reasonable employee, upon hearing Rosas make these comments, would conclude that “members of management are peering over [his] shoulders” to monitor his Union or protected concerted activity, thus creating an unlawful impression of surveillance. *See Conley Trucking*, 349 NLRB 308.

Similarly, the statement to “be careful” because IBT is watching implies that there will be adverse consequences if IBT notices something it does not like during its monitoring. Once Rosas mentioned labor charges, the only reasonable conclusion an employee could make is that the adverse actions that Rosas is warning about will occur for actions similar to filing labor charges—in other words, for engaging in protected concerted activity. When coupled with the fact that drivers credibly testified that Rosas had previously mentioned terminating Union supporters, (Tr. 211, 521-22), an employee would reasonably see Rosas’ comments as also being a threat that he or she could be terminated for engaging in certain protected concerted activity.

Now, it is not clear what Safety Coordinator/Assistant Rosas’ motive was in making these statements. On the one hand, she could have callously been attempting to threaten Osoy in an effort to prevent him from engaging in protected concerted activity. On the other hand, it is also possible that Rosas genuinely wanted to warn Osoy about what other managers or

supervisors could do to him if he was not careful. This latter motivation would actually fit in with the non-threatening demeanor that the ALJ remarked upon. Even if she was trying to warn Osoy, however, the nature of the comments and their unlawfulness does not change. *Casey Mfg. Co.*, 167 NLRB 89, 91 (1967) (8(a)(1) violation “does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.”) Therefore, whether Osoy believed that Rosas herself was threatening to monitor his actions and fire him, or whether Osoy believed that Rosas was helping him out by telling him what other manager would do, any reasonable employee would be chilled from exercising their rights because Rosas’ comments must be understood as an announcement that *someone* at IBT is monitoring the employees’ protected concerted activity and will terminate employees engaging in those activities.

For these reasons, the Board should reverse the ALJ’s conclusion that Rosas’ comments did not violate the Act.

B. IBT's Suspension and/or Discharge of Osoy Violated Sections 8(a)(1) and (3) of the Act because IBT Did Not Meet Its Burden Under *Wright Line*

(Exceptions 11-21, 30-76)

To determine whether an Employer had unlawful reasons for taking adverse action against an employee, the Board relies on the test laid out in *Wright Line*. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). Under this test, the General Counsel establishes a prima facie case of discriminatory action by showing: (1) union or other protected concerted activity; (2) employer knowledge of the union or other protected concerted activity; (3) animus toward the union or other protected concerted activity; and (4) causation: the adverse employment action was motivated by the Employer's animus towards the union or other protected concerted activity. *Id.*

If a prima facie case is established by the General Counsel, the burden shifts to the Respondent to show it would have reached the same decision absent protected conduct. *Id.* The Board has consistently held that an employer cannot carry its burden under *Wright Line* simply by showing that it had a legitimate reason for the adverse action, but must persuade by a preponderance of the evidence that the personnel action would have taken place even absent the protected conduct undertaken by the employee. *T&J*

Trucking Co., 316 NLRB 771 (1995); *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984).

Further, the employer must demonstrate that the asserted legitimate reason was the *actual* motivation for its actions and not just pretext. *T&J Trucking Co.*, 316 NLRB at 771-73; *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 637 (2011), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed.App'x. 45 (D.C. Cir. 2012). In this case, IBT failed to carry that burden because its asserted legitimate reasons are a pretext to cover its unlawful motives.

The ALJ correctly found that the General Counsel established a prima facie case under *Wright Line*. First, “[c]harging Party engaged in protected and concerted activity when he engaged in strikes, wore and distributed safety vests with the Union logo, and spoke with his co-workers.” (ALJD 28) Second, “it is undisputed that the Employer was aware of Osoy's Union activity .” (ALJD 28). Third, “the discipline took place within a time frame in which improper motives can be inferred. [and] the timing of the discipline [was] sufficient to support an inference of animus.” (ALJD 28).

The record evidence, however, does not support the ALJ's further finding that Respondent met its burden of proving that it would have taken the same action in the absence of Osoy's protected activity. Instead, the record compels a conclusion that any non-discriminatory reason proffered by Respondent is nothing more than a pretext to cover up IBT's unlawful

motives for its actions against Osoy. As further described below, this finding of pretext is supported by the evidence in the record that: (1) IBT intended to permanently discharge Osoy when it removed him from the IBT yard with two armed guards; (2) IBT chose the most public and humiliating method of removing Osoy, when it had other options, in order to chill Section 7 activity; (3) the ALJ incorrectly weighed Osoy's corroborated testimony and Molina's uncorroborated testimony regarding this incident; (4) IBT failed to conduct a meaningful investigation into this incident; and (5) IBT's actions against Osoy were more severe than any action taken against other drivers who engage in similar conduct.

The Board has made clear that such a finding of pretext defeats an employer's attempt to meet its burden under *Wright Line*. See *Stevens Creek*, 357 NLRB at 637. Therefore, as further described below, IBT cannot show that it had a non-discriminatory reason for the actions it took against Osoy. IBT thus violated Sections 8(a)(1) and (3) of the Act by suspending and/or discharging Osoy for his Union and protected concerted activity.

1. AJD Erred in Finding that Respondent Only Took Osoy Out of Service Temporarily In Order to Investigate
(Exceptions 13-15, 18-21, 50-51, 56, 72)

To begin, the ALJ erred by finding that IBT's adverse action against Osoy was intended to be nothing more than a temporary "hold" pending an

investigation. (ALJD 27:16-17). Based on the evidence in the record, the ALJ should have found that IBT intended to permanently discharge Osoy when it first placed him out of service, and that this intended discharge became a suspension once IBT abandoned its discharge plan and allowed Osoy to return to work.

There is no evidence in the record which supports a finding that IBT's initial decision to take adverse action against Osoy was intended to be temporary. For example, both in the letter given to Osoy and in the email to IBT staff, Safety Director Bradley stated that Osoy was prohibited from entering the property "until further notice." (Jt. Exh. 1(e), GC Exh. 102). These notices do not state that Osoy is prohibited from enter the property until IBT completes an investigation, or that Osoy is prohibited from entering the property until IBT has decided what action it will take against Osoy, or that Osoy's exclusion from the property is for a specific time period. Neither of these documents even mention a pending investigation. Instead, the letter to Osoy described the alleged threats made by Osoy as facts rather than allegations, and with finality states that IBT will not permit this conduct on its property. (Jt. Exh. 1(e)). The only reasonable reading of this letter is that, at least at the time the letter was drafted and presented to Osoy, IBT believed its separation with Osoy would be permanent.

This conclusion is further supported by the fact that IBT attempted to return Osoy's escrow check to him after he was escorted out of the property, and also tried to get Osoy to sign a paper saying he was leaving IBT. (Tr. 271). Escrow is an amount that IBT keeps in reserve from its driver paychecks to use in the case of damages to the vehicle or other expenses not covered by the driver, and it is undisputed that this escrow amount is only returned to the driver when that driver has ended his working relationship with IBT. IBT managers also testified that IBT typically waits some period after a driver has been separated before returning this amount, although testimony is conflicting as to whether IBT waits 30 days or 45 days after a drivers' separation before returning the escrow amount. (Tr. 1846-47, 2258-59, 2379; 2637-38).

By offering Osoy his escrow check immediately after removing him from the IBT premises, IBT made clear that it believed that the working relationship between itself and Osoy was permanently severed—there would be no reason to return this escrow amount otherwise. In addition, the fact that IBT offered this escrow amount to Osoy without even waiting the 30 or 45 days it normally waits, time which IBT takes to ensure there are no problems with the truck or outstanding fees due from the driver, indicates that IBT wanted Osoy permanently out as quickly as possible.

Similarly, IBT's request that Osoy sign a document stating that he was leaving IBT must also be seen as evidence that IBT considered its separation with Osoy to be permanent. If IBT really intended to only take Osoy out of service while it investigated the incident with Molina, why would it ever request that Osoy sign this paper? After all, it would have still been possible for IBT's investigation to find that Osoy was not guilty of any wrongdoing and deserved to continue working. IBT requesting that Osoy sign a separation letter would have completely foreclosed this possibility.

The fact that IBT, from the very beginning, considered the separation with Osoy to be permanent is significant because it indicates that IBT's goal was not to actually address the situation between Osoy and Molina, but to merely grab onto any reason it could to get Osoy—a strong and vocal union supporter—out of the company. IBT's only preferred reasons for its actions against Osoy—that it was temporarily removing a threat pending investigation—is completely illogical and is exposed as nothing more than an after-the-fact justification if IBT intended to permanently discharge Osoy when it removed Osoy from its premises. When coupled with the other errors committed by the ALJ, described below, this fact makes clear that IBT's proffered reason for disciplining Osoy was nothing more than pretext.

Therefore, the ALJ failed to consider this overwhelming evidence in the record that IBT intended to permanently terminate Osoy and erred in finding

that IBT intended the separation to be temporary while an investigation was conducted. This error supports a reversal of the ALJ's finding that IBT met its burden under *Wright Line*.

2. ALJ Erred by Failing to Consider the Harassing and Humiliating Effect of Having Armed Guards Escort Osoy Out of the IBT Yard

(Exceptions 14, 19-21, 31, 41-49, 52, 57-59)

In his decision, the ALJ completely failed to discuss the choice that IBT made to call *two* armed security guards to remove a driver who it had recently called one of IBT's "most respected, well liked, and responsible" drivers. (U. Exh. 7, 8). This choice by IBT is particularly significant because it demonstrates that IBT was not truly responding to a perceived threat at its facility—it was looking for the most public and humiliating way of removing one of the strongest union supporters from its worksite, with the goal of chilling both Osoy's Section 7 activity and the Section 7 activity of any driver who witnessed Osoy's humiliating removal from the IBT premises.

As an initial matter, the ALJ failed to find that using armed guards to remove Osoy was a *choice* made by IBT and that IBT could have avoided any threat to its drivers or workplace without using armed guards at all. IBT claims that it had Osoy removed by armed guards because Osoy had made a threat and IBT was scared of further physical violence from Osoy. This claim by IBT ignores the fact that nearly 24 hours had passed between when the

incident occurred and when Osoy was removed from the IBT premises. (Tr. 2354). Not only had 24 hours passed, but immediately after the incident Osoy worked for several hours and then returned to the IBT yard to turn in his truck, all without incident. (Tr. 227-28). This 24-hour delay, coupled with the fact that Osoy worked after the incident and was allowed to return to the yard the following morning, demonstrates that IBT did not perceive Osoy as a threat but capitalized on the incident to coerce Osoy and other supporters from exercising their rights under the Act.

In fact, there is no evidence at all that Osoy constituted a threat at any point. IBT did not present any drivers who testified that they felt threatened by Osoy, and IBT managers did not testify or introduce other evidence that any driver had reported feeling threatened by Osoy. Even Molina, who testified that Osoy suggested they go outside and fight, admitted on the stand that he did not take Osoy's words seriously. (Tr. 2820-21). If Osoy was never actually a threat to anyone, not even to the person he allegedly wanted to fight, IBT had absolutely no legitimate reason for using armed guards to remove Osoy.

Even if we give IBT the benefit of the doubt, however, and assume that IBT did have some legitimate concern for maintaining safety at its facility, its actions demonstrate that this concern was not the actual reason it decided to use armed guards to remove Osoy. If IBT's real concern was keeping Osoy out

of its property to ensure safety, IBT could have easily done that by telling Osoy on the day of the incident, after he finished working, that he should not come in the following day because IBT will be investigating the incident. If IBT did not want to say that to Osoy in person, it could have called Osoy at home at any point from when Osoy went home following the incident, to when Osoy showed up the following morning and was removed by armed guards. This is in fact what IBT did when a driver who crossed the Union picket line actually physically assaulted a picketer—IBT called him at home, told him not to come in, and requested a statement. (Tr. 1928-34; GC Exh. 89)

If IBT's real concern with Osoy was safety, this would have been the safest course of action—IBT would have kept Osoy out of the yard and could have then informed its normal security guards at its gate not to let Osoy in. Instead, IBT purposefully allowed Osoy to return to the IBT yard only to have him removed by armed guards. The fact that IBT invited Osoy to return for the purpose of giving him the bad news that he was terminated—a potentially explosive situation for any employee, let alone one the Employer ostensibly believes has already acted in a threatening manner—is strong evidence that IBT's reason for calling armed guards was not the safety of its yard. This conclusion is further supported by the fact that when Osoy did show up at the yard he hung around for at least an hour waiting for managers to show up, and when he asked Manager Rivera to unlock his

container, she told him to wait in yard completely unsupervised before Safety Director Bradley called him into the meeting with the armed guards. (Tr. 228-29, 269). Again, asking Osoy to wait in the yard unsupervised is not something you would do if your main concern was that Osoy was dangerous.

The evidence in the record supports a finding that IBT's real reason for using armed guards to remove Osoy was to harass and humiliate Osoy, and to chill any further exercise of Section 7 rights at the facility. Not only did IBT fail to call Osoy at home to tell him not to come into work, IBT actually assigned Osoy a route that required Osoy to show up to work particularly early—this was a very favorable route for drivers, and Osoy was not often offered this route. (Tr. 227-28). Not coincidentally, this early assignment would ensure that Osoy was at the facility before the morning dispatch began at 6:00 a.m.—the time of day when most drivers would be gathered in the yard. Then, when Osoy showed up to work a little after 4:00 a.m., he found the container he had been assigned locked—another strange occurrence which indicates that at some point before Osoy showed up, someone made the choice to lock his container rather than calling him and just telling him not to show up to work. (Tr. 228-29). Then, instead of making Osoy wait until managers regularly showed up at work—after 7:00 a.m., when most drivers have already been dispatched—to escort Osoy off the property, IBT's managers showed up to work approximately 45 minutes before dispatch

started and picked this time to have Osoy removed by armed guards. (Tr. (Tr. 228-29, 269).

In so doing, IBT accomplished its goal of harassing and humiliating Osoy in front of as many workers as possible. Approximately 40 other drivers witnessed Osoy being escorted out by the armed guards. (Tr. 233, 527). They saw Osoy on the verge of tears, being treated as a “delinquent.” This whole experience tortures Osoy. (Tr. 233, 527). IBT’s actions and the steps it took to ensure it could humiliate Osoy in this way make clear that IBT’s claim about safety concerns being the reason for its adverse actions against Osoy is nothing more than pretext. It is clear that the real reason why IBT wanted to take these actions is to retaliate against Osoy for being such a strong and vocal Union supporter. The ALJ erred by not so finding.

In addition, the ALJ erred by not recognizing that this choice by IBT also constitutes an independent violation of Section 8(a)(1). By ensuring that this humiliation was done in front of as many drivers as possible, IBT sent the message that drivers who engage in the type of open Union support that Osoy engaged in are liable to also be treated like delinquents and escorted out of IBT’s yard by armed guards. Any driver who witnesses this incident would reasonably be chilled from exercising their Section 7 rights in order to avoid the same fate, and IBT’s choice to set Osoy up to be removed by armed

guards is both evidence of an unlawful and discriminatory motive for IBT's actions, and an independent violation of the Act.

3. ALJ Erred in Finding that Molina's and Osoy's Testimony Supported IBT's Actions Against Osoy

(Exceptions 11, 12, 14, 16, 18-21, 30, 32-38)

The ALJ erred in determining what weight to give certain portions of Molina and Osoy's testimony regarding the incident between them.¹⁰

Specifically, the ALJ failed to find both that Molina made certain key admissions in his testimony and that other portions of Molina's testimony

¹⁰ Although the ALJ mentions credibility when referring to Molina's testimony, it is clear from the decision that the ALJ's conclusions regarding Osoy's suspension and/or termination are not actually based on a credibility determination. The ALJ does not make a "true credibility determination" which would have required the judge to consider "the witnesses' testimony in context, including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." See *In Re Double D. Const. Grp., Inc.*, 339 NLRB 303, 305 (2003). Therefore, the Board should review the ALJ's decision de novo.

Further, even if credibility did play some role in the ALJ's decision, it is clear that the Board is empowered to come to its own conclusion regarding credibility because the ALJ does not rely on an analysis of Molina's demeanor. The Board has recognized that "where an administrative law judge's credibility resolutions are not based on demeanor analyses, the Board is as fully capable of analyzing the record as the administrative law judge." *Herbert F. Darling, Inc.*, 267 NLRB 476, 477 (1983). Here, the Board can itself analyze "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole" to determine who was more credible regarding the incident between Molina and Osoy. As further described in this section, the record makes clear that Osoy's corroborated testimony is the one that should have been credited.

were completely uncorroborated by other witnesses to the incident. Further, the ALJ failed to find that Osoy's version of the incident with Molina is largely corroborated by other drivers who did witness the incident, and incorrectly concluded that certain admissions in Osoy's testimony supported IBT's actions. Had the ALJ properly credited their respective testimonies, it would have become clear that neither Osoy's nor Molina's testimony supported the actions that IBT took against Osoy.

The most pertinent portion of Molina's testimony—that Osoy threatened him by asking him to go outside and fight—is completely uncorroborated by any other drivers. (Tr. 225, 717-20, 852-53, 974-75, 2814-16). In fact, three drivers who also testified about the incident, including Osoy, completely contradict Molina's testimony. Osoy himself asserts that he did not threaten Molina, and that he only asked Molina to go outside in order to discuss their issues while avoiding cameras. (Tr. 225). Portillo and Miranda corroborate Osoy's account by confirming that Osoy said he would go outside to talk about issues but that Osoy never mentioned fighting, either Molina or any other gathered drivers. (Tr. 720, 852, 974-75).

Additionally, Osoy's contemporaneous incident report and email to IBT also fail to support IBT's actions. (GC Exh. 6). In this email and report, Osoy points out that Molina and other drivers who threaten union supporters are not subject to the same harassing, humiliating, and intimidation conduct that

Osoy was subject to. He also reiterated that he never threatened Molina or any other driver, that it was Molina who instigated the entire incident, and that it was Molina who was being aggressive by screaming at and insulting Osoy—none of these facts support IBT’s actions, and they are actually strong evidence that IBT’s actions were not based on the desire to contain a threat while conducting an investigation. (GC Exh. 6).

Because Molina’s testimony is completely uncorroborated and is actually contradicted by overwhelming evidence in the record, the ALJ erred by giving that portion of Molina’s testimony any weight. Further, although Osoy did admit to suggesting going outside, corroborated evidence demonstrates not only that Osoy made this comment in a non-threatening manner and intended merely to talk about issues, but that it was Molina who was being aggressive and instigated the incident. (Tr. 225, 717-20, 852-53, 974-75). As such, the ALJ also erred by finding that Osoy’s own admissions corroborated the basis for IBT’s actions. Had the ALJ properly considered Osoy’s corroborated testimony, the ALJ would have found that Osoy did not make any threats and was not a threat himself. This directly contradicts—rather than corroborates—IBT’s alleged basis for disciplining Osoy.

Furthermore, the Judge failed to properly credit and consider certain admissions made by Molina in his own testimony. To begin, Molina admitted that he instigated the incident with Osoy when he went up to Osoy to ask

Osoy if he had a problem with what Molina was doing. (Tr. 2813-14). The fact that Molina, not Osoy, instigated the exchange is evidence that Osoy's version of the incident was more credible. The ALJ also appears to ignore Molina's admission that he did not take Osoy seriously and only reported the incident because he expected the Union supporters to report their version of the incident to the Union. (Tr. 2820-21). This admission cuts at the very core of IBT's claim that all it was doing was responding to a threat because there is no evidence that a threat actually existed. Molina admitted he did not take Osoy seriously and never testified that he felt threatened during his interaction with Osoy. Moreover, the record is devoid of any evidence that Molina ever even reported feeling threatened, and IBT did not present any evidence that any other employee reported feeling threatened by Osoy.

When taken together these facts indicate that Osoy's removal, and the choice to use two armed guards in front of dozens of other drivers, were not based on fears of violence or on concern for drivers or on any other legitimate rationale. Instead, IBT's actions were motivated solely by its desire to get rid of a strong Union supporter, and to do so publicly and humiliatingly. The ALJ therefore erred by not properly crediting and weighing the testimonies of Osoy and Molina, and by finding that both of their testimonies supported IBT's actions. This error supports a reversal of the ALJ's conclusion that IBT met its burden under *Wright Line*.

4. ALJ Erred in Finding that Respondent Conducted a Meaningful Investigation of the Incident Between Osoy and Molina

(Exceptions 13, 14, 15, 17, 19-21, 39-41, 53-55, 60-71)

The ALJ's conclusion that IBT conducted a meaningful investigation in this case is not supported by the record evidence. Instead, the record paints a picture of an employer who heard a complaint about a strong Union supporter it wanted to get rid of, and jumped on the opportunity to permanently get rid of that Union supporter with nothing more than a completely cursory investigation of the (unfounded) accusations. The Board has consistently held that the failure to conduct a meaningful investigation, including not giving the subject of the investigation an opportunity to explain, are clear indicial of discriminatory intent. *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998), *enfd.* 201 F.3d 592 (5th Cir. 2000); *Diamond Electric Mfg.*, 346 NLRB 857, 860 (2006); *Amptech, Inc.*, 342 NLRB 1131, 1146 (2004) ("failure to inquire of [employee] as to what had occurred constituted a rush to judgment attributable to Respondent's unlawful motivation to take adverse action against the leading pro-union employee on the premises"), *enfd.* 165 Fed. Appx. 435 (6th Cir. 2006); *Southern Electronics Co., Inc.*, 175 NLRB 69, 72 (1969), *enfd.* 430 F.2d 1391 (6th Cir. 1970) ("investigation . . . was a one-sided affair with the purpose not

being to determine precisely what occurred in the stockroom that morning, but rather to secure sufficient reasons to justify a discharge”).

IBT’s actions are suspect from the very initial decision to remove Osoy from IBT. Safety Director Bradley and Vice President Zea claim that they came to this conclusion, yet both of them did so without talking to Osoy. (Tr. 1914-15; 1921). In fact, Zea had not spoken with *anyone* who had actually witnessed the incident when he instructed Bradley to have Osoy removed from the premises. (Tr. 2353-56, 2358, 2829). While Bradley did sit in for a portion of the meeting where Molina first reported this incident to Manager Rivera, Bradley had not solicited a statement from Molina or spoke to any other witnesses before making the decision to remove Osoy. (Tr. 731-35; 976-978; 1926; 2826-29). This fact, standing alone, indicates that IBT was not trying to learn the truth about what occurred. Instead, IBT was trying to learn just enough to fabricate a reason to terminate Osoy.

Even when Molina did report the incident to Manager Rivera, neither Rivera nor Safety Director Bradley requested a written statement from Molina. Neither of them took notes based on what Molina was saying, and no one from IBT ever followed up with Molina regarding his report. (Tr. 2827-29). This is particularly surprising because Molina admittedly gave Rivera the names of approximately four different witnesses to the incident, none of which were written down by Molina. (Tr. 2828). It is no surprise that there is

absolutely no evidence of IBT ever following up with any of these identified witnesses. This complete failure to interview witnesses—without any plausible justification—is an obvious flaw in any investigation.

IBT similarly failed to adequately interview possible witnesses even after those possible witnesses themselves went to IBT. After Osoy was removed from IBT's property, a group of approximately seven drivers went to Safety Director Bradley's office to protest Osoy's treatment and to ask for equitable treatment between Osoy and Molina. Although Bradley promised to conduct an investigation, he did not provide any details to the group of drivers. Then, neither Bradley nor any other IBT representative ever followed up with these drivers to determine what they had witnessed. [Tr. 531, 731-32, 978-79, 1939).

Finally, the most glaring flaw in IBT's investigation is its failure to ever seek out a statement from Osoy. From the very beginning, IBT made it clear that it was not interested in such a statement. No one called Osoy to request his statement on the day the incident occurred. The following day, when Osoy was removed from the IBT property, Safety Director Bradley admittedly refused to even listen to Osoy's side of the story. [Tr. 231, 1916]. Even after Osoy was removed from the premises, IBT never sought out his version of events. The first time that IBT learned of Osoy's version of events is when Osoy, of his own volition and with the help of his Union, drafted an

email and incident report directly to Vice President Zea and Bradley. (Tr. Tr. 235, 239-40, 1922-1924; GC. Exh. 6). This utter failure by IBT to speak with the most critical person in its investigation indicates that IBT was not concerned with finding the truth, but rather had some discriminatory reason for its actions. *See Alstyle Apparel*, 351 NLRB 1287, 1287-1288 (2007) (“a limited investigation [and] deciding to discharge the employees before giving them an opportunity to explain the allegations against them . . . support[s] the conclusion that the discharges were discriminatorily motivated).

Therefore, the ALJ erred by finding that IBT had conducted a meaningful investigation and by failing to find that IBT had no plausible rationale for its actions, aside from anti-Union animus.

5. Disparate Treatment Between Osoy and Other Drivers Supports a Finding That IBT’s Proffered Reason is Nothing More than Pretext

(Exceptions 14, 19-21, 67, 73-76)

Well settled Board law makes it clear that disparate enforcement of an employer’s policy, particularly after protected concerted activity, is strong evidence that the employer’s asserted reason for its actions is nothing more than pretext. *See Ferland Management Co.*, 233 NLRB 467, 476 (1977) (finding pretext where company records reflect a lenient attitude toward employee breaches of policy, which sharply contrasted with rapid discharge of capable long-term employee with a proven record of satisfactory service);

Approved Electric, 356 NLRB 238, 240 (2010) (disparate disciplinary treatment following employee's protected activity is evidence that the Respondent's asserted reason for employee's discharge was false); *Lucky Cab Company*, 360 NLRB 271 (2014) (finding evidence of pretext where other employees were not discharged for same or similar infractions); *Camaco Lorain Mfg. Plant*, 356 NLRB 1182 (2011) (finding disparate treatment of the discriminatee in comparison to another employee supported an inference that protected concerted activity was a motivating factor in discharge).

In this case, the record clearly demonstrates that before, during, and after the incident between Molina and Oozy, other drivers who engaged in wrongdoing even more troubling than the wrongdoing Osoy was accused of were treated much more leniently by IBT.

Before Osoy and Molina's incident, a driver who became "very aggressive and combative," and even physically attempted to "get" a dispatcher was not even removed from work—at most, it appears that he was made to pay for certain property damage he caused in his rage. (Tr. 3960, 3993, 3965-66; R. Exh. 88, U. Exh. 27). Despite the driver's clearly threatening conduct, IBT did not call in security guards or otherwise contact security when this incident occurred, and the driver was not even asked to leave the premises, much less was he escorted out by two armed guards in front of his coworkers the next time he showed up to the yard. (Tr. 1993-94).

This treatment is clearly more lenient than IBT's treatment of Osoy, even though the allegations against Osoy appear less serious than the allegations against this other driver.

Similarly, contemporaneously to Osoy's treatment, IBT actions towards Molina also demonstrate disparate treatment. The record is clear that Molina instigated the incident with Osoy, and there was testimony from drivers that both Molina and Osoy were loud and engaged in the argument. Yet, only Osoy was removed from the IBT yard by armed guards (or removed from the yard at all). Additionally, in his email and incident report, Osoy alleges that Molina and other drivers have continually harassed and threatened Union supporters. Bradley admits that he did not even investigate these allegations, much less did he have those drivers removed from the IBT premises by armed guards. (Tr. 1956-58; 2357-2359).

Finally, a few months after the incident between Osoy and Molina, another driver actually got into a physical altercation with a picketer at the IBT yard. This driver ignored the commands of the security guard at the scene, and physically pushed the picketer. (Tr. 1928-30; GC Exh. 89). IBT may claim that the fact that this driver was eventually terminated indicates that there was no disparate treatment between him and Osoy. A detailed examination of this incident, however, demonstrates that such a claim would be completely unfounded. Rather than calling armed guards to remove this

driver the next time he came to work—like IBT did with Osoy—Safety Director Bradley went out of his way to call this driver *before* he next showed up to work to tell him not to come in. Then, unlike when he refused to listen to Osoy’s account of his incident with Molina, Bradley actually requested that this driver write down his version of the event. Although IBT did eventually terminate this driver’s contract with IBT, it inexplicably took them 20 days to do so—even though the evidence was clear that this driver, unlike Osoy, actually physically attacked someone else. (Tr. 1930-34).

This disparate treatment between Osoy and the only other drivers who have apparently engaged in conduct similar to what Osoy was accused of is a strong indication that IBT’s reasons were pretextual, and the ALJ therefore erred in finding that Respondent met its burden under *Wright Line*.¹¹ When coupled with all the other evidence, it is clear that IBT did not even come close to carrying its burden and its discharge and/or suspension of Osoy therefore violated Section 8(a)(1) and (3) of the Act.

¹¹ It is worth noting that any reliance by the ALJ on *Cast-Matic Corp.*, 350 NLRB 1349 (2007) was in error. Although the ALJ correctly quotes *Cast-Matic* for the basic proposition that an employer has some discretion in choosing what discipline is appropriate, this discretion does not apply when the employer’s proffered reasons for that discipline were mere pretext. *Id.* And that is the main distinguishing factor between *Cast-Matic* and the case at hand—the Employer in *Cast-Matic* had a legitimate reason for its adverse actions, *id.* at 1358, making deference appropriate, while IBT’s reasons in this case are clearly pretextual and meant to disguise IBT’s unlawful motive. *See supra.*

C. IBT's Suspension and/or Discharge Also Violated Section 8(a)(4) Because IBT Was Aware of Charges Being Filed by Osoy

(Exceptions 11-21, 30-76)

As described by the ALJ, the analysis of whether adverse action violates Section 8(a)(4) follows the same *Wright Line* analysis described above. (ALJD 29). When examining the evidence with the 8(a)(4) violation in mind, it is again clear that the General Counsel has established its prima facie case. First, there is no question that Osoy engaged in activity protected under Section 8(a)(4)—namely, filing charges at the labor board and providing testimony to support those charges. Second, Safety Coordinator/Assistant Rosas not only admitted that she was aware of labor charges, but she specifically brought up those charges to Osoy, indicating that IBT was aware that Osoy was one of the drivers involved in these charges. Additionally, Osoy's central role in the organizing campaign would also have been a strong indication to IBT that Osoy was involved in these labor charges. Third, as with the 8(a)(3) analysis, the timing of the adverse action against Osoy supports a finding that Osoy's actions at the Board were one of the motivating factors for IBT's actions—Osoy was suspended and/or terminated shortly after Rosas brought up these labor charges to him and told him to be careful, and during a time when it was clear that charges were pending against IBT at the NLRB (and when IBT was likely responding to

the Board's investigation over an amended charge).¹² Thus, it is clear that the General Counsel met its burden of establishing the prima facie case.

The next question becomes whether IBT can show that it would have taken the same action against Osoy were it not for Osoy's protected activity. As described in detail above, the evidence in this case makes it abundantly clear that IBT's alleged reasons for taking adverse action against Osoy was nothing more than pretext to hide IBT's unlawful motive. This analysis is equally applicable to the 8(a)(4) analysis, which means that IBT cannot carry its burden of showing it would have taken the same action absent protected activity. Thus, the ALJ erred by finding that IBT did not violate Section 8(a)(4) of the Act when it suspended and/or discharged Osoy.

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¹² The earlier charge in the consolidated complaint was first filed in August 2015, and amended for a second time in March 2016 (two months before Osoy was terminated).

IV. Conclusion

Based on the entire record in this matter and on the foregoing argument, the General Counsel respectfully requests that the Board reverse the ALJ and find that Respondent violated Sections 8(a)(1), (3) and (4) of the Act by suspending and/or discharging Osoy, and violated Section 8(a)(1) of the Act, through Safety Coordinator/Assistant Rosas, by creating an unlawful impression of surveillance and threatening employees with discharge for engaging in protected concerted activity.

DATED: March 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on March 16, 2018.

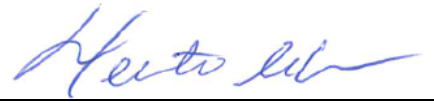
The following parties were served with a copy of said documents by electronic mail on March 16, 2018:

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